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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON
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8 DANIEL R. GOLDEN and CINDY
9 R. GOLDEN, husband and wife,

10 Plaintiffs,

11 v.

12 CH2M HILL HANFORD GROUP,
13 INC.,

14 Defendant.
15

No. CV-04-5076-LRS

ORDER OF REMAND

16 In an order filed July 15, 2008 (Ct. Rec. 73), this court directed the parties
17 to show cause why this court should refrain from exercising supplemental
18 jurisdiction over remaining pendent state law claims and dismiss the same without
19 prejudice to their reassertion in state court. 28 U.S.C. Section 1367(c)(3)(district
20 court may decline to exercise supplemental jurisdiction where all claims over
21 which it had original jurisdiction have been dismissed). The parties filed
22 respective show cause responses (Ct. Rec. 74 and 75) and telephonic argument
23 was heard on August 26, 2008. William Rutzick, Esq., argued on behalf of
24 Plaintiffs. Mary Rose Alexander, Esq., argued on behalf of Defendant.

25 In an opinion filed June 11, 2008, the Ninth Circuit Court of Appeals found
26 this court had properly granted summary judgment to Defendant on Plaintiff's
27 claims for physical injury and emotional distress based on exposure to radioactive
28

1 materials. *Golden v. CH2M Hill Hanford Group, Inc.*, 528 F.3d 681, 683-84 (9th
 2 Cir. 2008). The circuit also found, however, that it was “possible that Golden
 3 suffered emotional distress from exposure to nonradioactive materials that is
 4 separate and distinct from his emotional distress claim for exposure to the
 5 radioactive materials.” *Id.* at 684. State law claims for such emotional distress are
 6 not pre-empted by the Price-Anderson Act even though Golden could not show
 7 that he suffered physical injuries as a result of his exposure. *Id.* According to the
 8 circuit:

9 It is possible that claims of emotional distress for exposure
 10 to radioactive materials are simply not separable from other
 11 harms. . . . If Golden can only show emotional distress
 12 arising out of a general fear for his future health that is
 13 intertwined with his exposure to radioactive materials, the
 14 Price-Anderson Act will apply **and his emotional distress**
 15 **claim for exposure to nonradioactive materials will be**
 16 **preempted.** [Citations omitted]. But Golden may be able
 17 to make out a case that he suffers separate and distinct
 18 fears arising from his exposure to nonradioactive heavy
 19 metals. **If so, that claim is not preempted, and Golden may**
 20 **be able to prove his claim under state law.** Likewise,
 21 Mrs. Golden may be able to prove her **loss of consortium**
 22 **claim under state law**, if she can show loss of consortium
 23 resulting from Golden’s emotional distress that was caused
 24 by his exposure to nonradioactive materials. We therefore
 25 vacate the district court’s order dismissing **Golden’s**
 26 **emotional distress claim resulting from exposure to**
 27 **nonradioactive materials and Mrs. Golden’s loss of**
 28 **consortium claim**, and remand for the district court to
 determine whether it wishes to exercise supplemental
 jurisdiction over any such claim, now that the federal claims
 have been dismissed.

21 *Id.* (emphasis added).

22 Defendant contends this court “should retain jurisdiction over this action
 23 and dismiss it with prejudice.” According to Defendant, Plaintiffs have not pled a
 24 separate and distinct claim for emotional distress arising from exposure solely to
 25 nonradioactive materials. It is apparent, however, that the Ninth Circuit Court of
 26 Appeals treated Plaintiffs’ complaint as potentially pleading a state law emotional
 27 distress claim based on exposure only to nonradioactive materials. Otherwise, the
 28 circuit would not have asked this court to consider whether it would exercise

1 supplemental jurisdiction over such a claim.¹ Whether Plaintiffs have **adequately**
2 pled such a claim is another matter, as is whether Mr. Golden can ultimately prove
3 he suffered a separate and distinct fear for his health arising from exposure to
4 nonradioactive heavy metals.

5 Plaintiffs contend this court should either retain jurisdiction or remand the
6 state law claims to Benton County Superior Court from whence this action was
7 removed in June 2004. Plaintiffs assert remand would be appropriate as opposed
8 to dismissal without prejudice because “a dismissal without prejudice now would
9 likely lead to a statute of limitations defense when the case is refiled in state court
10 following such dismissal without prejudice.” According to Plaintiffs, the three-
11 year statute of limitation expired in May 2005. Plaintiffs, however, fail to note
12 that 28 U.S.C. Section 1367(d) tolls the limitations period for pendent state law
13 claims during their pendency in federal court and for a period of 30 days after they
14 are dismissed, unless State law provides for a longer tolling period.

15 In any event, remand is certainly an option in this instance since the action
16 was removed from Benton County Superior Court. *Carnegie-Mellon Univ. v.*
17 *Cohill*, 484 U.S. 343, 357, 108 S.Ct. 614 (1988). In determining whether to
18 remand, the court considers the values of economy, convenience, fairness and
19 comity. *Acri v. Varian Assocs.*, 114 F.3d 999, 1001 (9th Cir. 1997). “[I]n the usual
20 case in which all federal-law claims are eliminated before trial, the balance of
21 factors will point toward declining to exercise jurisdiction over the remaining
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23
24 ¹ Defendant says that following the Ninth Circuit’s decision, “Golden’s only
25 remaining cause of action is a federal claim for emotional distress, the dismissal of
26 which the Ninth Circuit has affirmed.” This is not a remaining cause of action
27 since, as Defendant observes, the Ninth Circuit found “summary judgment was
28 proper as to his emotional distress claim for exposure to radioactive materials”
because under the federal Price-Anderson Act, such exposure must cause physical
injury. *Golden*, 528 F.3d at 683-84.

1 state-law claims.” *Id.*

2 This court recognizes that the captioned action has been pending in federal
3 court for a significant period of time. Discovery was conducted and there were
4 summary judgment proceedings. The discovery and the summary judgment
5 proceedings, however, did not focus on the issue identified by the circuit: whether
6 Mr. Golden can make out a case that he suffers separate and distinct fears arising
7 from his exposure to nonradioactive heavy metals and whether Mrs. Golden can
8 show loss of consortium resulting from Mr. Golden’s emotional distress that was
9 caused by his exposure to nonradioactive materials. Plaintiffs acknowledge there
10 has been considerable discovery, but assert it likely that additional discovery will
11 be required.

12 Having considered all of the relevant factors, pursuant to 28 U.S.C. Section
13 1367(c), this court declines to exercise supplemental jurisdiction over remaining
14 pendent state law claims for emotional distress and loss of consortium based on
15 Mr. Golden’s exposure to nonradioactive materials, and hereby **REMANDS** this
16 action to the Benton County Superior Court (Cause No. 04-2-01154-7) for
17 consideration and determination of those claims.² It will be for the Benton County
18 Superior Court to determine whether Plaintiffs have **adequately** pled state law
19 claims based on Mr. Golden’s exposure to nonradioactive materials and beyond
20 that, if necessary, whether additional discovery is warranted and whether Mr.

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22 ² The Ninth Circuit Court of Appeals remanded this matter to this court for
23 the sole and express purpose of having this court determine whether it would
24 exercise supplemental jurisdiction under 28 U.S.C. Section 1367(c)(3) “now that
25 the federal claims have been dismissed.” 528 F.3d at 684. The court of appeals
26 did not tell this court that there was still 28 U.S.C. Section 1331 federal question
27 jurisdiction under any particular theory (federal enclave, federal officer, etc.). The
28 court of appeals’ mandate issued on July 3, 2008 (Ct. Rec. 72), incorporating its
June 11, 2008 opinion, constitutes the “law of the case” and is binding on this
lower court.

1 Golden can ultimately prove he suffered a separate and distinct fear for his health
2 arising from exposure to nonradioactive heavy metals.

3 **IT IS SO ORDERED.** The District Court Executive is directed to enter
4 this order and provide copies of it to counsel of record. A certified copy of this
5 order shall be sent to the Clerk of the Court for Benton County.

6 **DATED** this 27th day of August, 2008.

7 *s/Lonny R. Suko*

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LONNY R. SUKO
United States District Judge